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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 903

BRODERICK AND BASCOM ROPE COMPANY, A CORPORATION,

Petitioner,

vs.

EUGENE MANGAN,

Respondent.

REPLY BRIEF OF PETITIONER.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Statement of the Case	1-3
Reasons for Granting the Writ	3
Conclusion	10

CITATIONS.

Cases.

Allen v. U. S., 164 U. S. 492 at 501	8, 9
Bowers v. T. J. Rose Mfg. Co. (9th Cir.), 149 F. 2d 612	5
Brayton v. Crowell-Collier Pub. Co. (1953), 2nd Cir., 205 F. 2d 644	5
Eichel v. New York C. R. Co., 375 U. S. 253	7
Erie R. Co. v. Tompkins (1938), 304 U. S. 64	6
Green v. U. S. (1962), 5th Cir., 309 Fed. 2d 852	9
Jenkins v. U. S., 380 U. S. 445	8
Mokrzycki v. Olson Rug Co. (1960), 28 Ill. App. 2d 117, 170 N. E. 2d 635	6, 8
Orthopedic Equipment Co. v. Eutsler, 276 Fed. 2d 455	8
Simler v. Conner (1963), 372 U. S. 221	8
Smith v. Majestic (1957), 2 N. Y. 2d 544	7
Thompson v. Allen, 240 Fed. 2d 266	8
Tipton v. Socony Mobil Oil Co., 375 U. S. 34	7
United States v. Rogers, 289 Fed. 2d 433	9
West v. American Telephone & Telegraph Co., 311 U. S. 223	6
West v. American Telephone & Telegraph Co. (1940), 311 U. S. 223 at 237	6
Woods v. Stewart, 5th Cir., 171 F. 2d 544	5

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STATEMENT OF CASE.

Counsel asserts: "We could show by a review of the record that the cable which broke was petitioner's * * *." (Res. Brief 2.) The above statement is unconscionably false. If there were any evidence that the cable which broke was petitioner's, counsel could have named the witness or the document.

As we stated in the petition:

> "There is no evidence connecting the cord which broke with petitioner. The evidence is unmistakably clear that the cable which broke was not petitioner's cable." (Pet. 7.)

No witness other than Hines, who made delivery (Res. A. 489) (Pet. 8) claims to have seen petitioner's cable after it left petitioner's warehouse on Monday, November 14, 1960, 16 days before the accident.

Between Monday, November 14, 1960 and Thursday, December 1, 1960, the date of the accident, 14 full working days intervened. Petitioner and his co-workers installed 24 to 26 panels a day. (Res. A. 285) (Pet. 9.)

A change of cable was required after 6 to 7 or maybe 8 panels. (Res. A. 284) (Pet. 9.) Hence, the least number of ropes used in any one of the 14 days was three. Petitioner and his co-workers had used not less than 42 ropes during the 14 working days which had intervened after delivery of petitioner's cord.

Mr. Lempke who had charge of seeing that there was a supply of cable for installing panels was still employed by Schweitzer at the time of trial (Pet. 12) (Res. A. 311), but not called as a witness. (Res. A. II-IV.)

Petitioner's witness Dickson was permitted to inspect on discovery examination some pieces of cord totaling 39 feet in length. He testified the color of the center core of three of the pieces was different from the fourth.

The fourth piece was from a different manufacturer. (Res. A. 537.)

He determined the cord he saw was not petitioner's product. (Pet. A. 541-542.)

Respondent never accounted for not producing the 39 feet of cable shown on discovery examination. (Res. A. 528-529.)

Respondent called Marie Weiss supposedly to show that she had discarded the broken cable. On cross-examination it appeared the cable she removed was 4 feet long. It was old black wire. (Res. A. 406-407) (Pet. 13.)

The documents indicate petitioner's cord was 6 x 37.

The receipted delivery ticket of November 14, 1960 shows it was "50 ft. ¼" 6 x 37 Yellow Strand, Reg. F. C." (Pet. A. 13) (Pet. 8.)

The invoice of November 14, 1960 shows it was "50 ft. ¼" Reg. F. C. Yellow Strand." (Pet. A. 11) (Pet. 8.)

Petitioner's sales record shows it was ¼" 6 x 37 Yellow Strand (Pet. 8) (Pet. A. 17.)

Respondent's testimony which we have set forth in the petition (Pet. 10) shows that the cord which respondent picked up on the morning of December 1, 1960 could not have been the cord Hines delivered November 14, 1960—sixteen days before.

REASONS FOR GRANTING THE WRIT.

I.

Rule 36 of the Rules of Civil Procedure should be construed by this Court. In this case the charge of misdelivery was withheld until the case was on trial.

This Court should construe Rule 11 where it affirmatively appears that the pleadings filed stating a cause of action which the attorney knew he would not attempt to prove, where the attorney withheld the charge on which he relied until after the case was on trial.

This Court should construe whether or not this would permit a District Court in its discretion to allow an answer to be made to a request for an admission under Rule 36 which prior to that time had been irrelevant.

This Court should construe Rule 36 as to whether or not a forfeiture can be insisted upon where the party making the request has not specified the time required by the wording of the rule and provided in the statutory form.

This Court should construe Rule 36 as to whether or not the District Judge in his discretion could allow an answer to be made to a request under Rule 36 at the time the requesting party changed his charge of negligence rendering material for the first time the matter stated in the request.

This Court should construe Rule 36 and determine whether or not a District Court could allow an answer to be filed where it appeared affirmatively that the failure to answer was through mistake; that the other party had not been prejudiced in that he had the same identical material under oath which had been filed in an answer under Rule 33.

When the matter was before the District Court petitioner's counsel pointed out that on September 10, 1962 they had filed answers to interrogatories (Res. A. 410); that No. 4 showed that the cord delivered was ¼" 6 x 37 yellow strand wire rope. (Res. A. 410-411.)

In the course of the argument the trial judge stated to respondent's counsel, "You were apprised on that day there was an issue certainly on this question. There could not help but be an issue." (Res. A. 411.) Referring to the answers under Rule 33 (Pet. 17) the Court told respondent's counsel he knew on September 10th that petitioner was contesting the issue. (Res. A. 412.) The judge stated that the order on September 10, 1962 left the question of the requests for admissions hanging. "Now the thing was just left hanging, and it has been left hanging ever since." (Res. A. 412, Pet. 14-15.)

The answers under Rule 33 covered the request. The record in regard to the disposal of the motion was uncertain. (Res. A. 413.)

Petitioner's counsel had tendered answer to request No. 5 and the judge had not allowed it to be filed. (Res. A. 416.) The court stated he would allow the record to stand as it was. (Res. A. 417.) That is, the answer filed

under Rule 33 would stand as an answer to the request under Rule 36.

In *Bowers* v. *T. J. Rose Mfg. Co.*, 9th Cir. 149 F. 2d 612 the court held that where by mistake counsel had failed to answer the request, the District Court erred in striking an answer presented upon the hearing of a motion for summary judgment. It appeared that failure to answer had been through mistake. The District Court had abused its discretion.

Woods v. *Stewart*, 5th Cir. 171 F. 2d 544 holds that where the defendant claimed a defense but had failed to file a proper answer, defendant should be given an opportunity to answer.

The Court of Appeals for the 7th Circuit holds that the District Court has no discretion to allow an answer under Rule 33 to stand as an answer to the request under Rule 36.

Counsel asserts: "The unanswered requests for admissions have the same probative value as sworn testimony." (Res. Brief 7.)

Respondent's answers under Rule 33 (Res. A. 14-15) (Pet. 17-18) could be read in evidence as sworn admissions under Rule 33:

> "Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the same extent as provided in Rule 26(d) for the use of the deposition of a party."

As was held in *Brayton* v. *Crowell-Collier Pub. Co.* (1953), 2nd Cir. 205 F. 2d 644 at 646:

> "Certain pretrial interrogatories and defendant's answer thereto were received in evidence over defendant's objection. As this matter was relevant to the issue of the correct interpretation of the article, its reception was proper."

II.

As stated by Mr. Justice Stone in *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, the purpose of Section 1652 of the Judicial Act is to avoid the maintenance within a state of two divergent or conflicting systems of law, one applied in the state courts and the other to be availed of in the Federal courts only in case of diversity of citizenship. This object would be thwarted if the Federal courts were free to choose their own rules of decision whenever the highest court of a state had not spoken.

There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are, nevertheless, laws of the state although the highest court of the state has never passed upon them. 311 U. S. 223 at 236.

Since this Court's decision in *Erie R. Co.* v. *Tompkins* (1938), 304 U. S. 64, in diversity cases the Federal Courts are bound to follow state law. The Court of Appeals was bound to follow *Mokrzycki* v. *Olson Rug Co.* (1960), 28 Ill. App. 2d 117, 170 N. E. 2d 635. As was stated in *West* v. *American Telephone & Telegraph Company* (1940), 311 U. S. 223 at 237 (Pet. 32) Illinois is not without law though its highest court has not declared it. The Court of Appeals in its opinion says:

> "Though we can conceive of instances in which the compensation factor might have the effect of discrediting a witness, we think that the use of such evidence should be limited to instances in which possible bias is revealed by some act or factor more profound than the mere fact of employment by a particular employer.
>
> "We are, therefore, constrained to disagree with the *Olson* opinion."

As pointed out in the petition, there is not an Illinois dictum contrary to the *Olson Rug* decision.

We have already pointed out that the three Illinois decisions cited at page 11 of respondent's brief (Res. Brief 11) do not contain a word contrary to the *Olson* decision (Pet. 27-28).

Petitioner's counsel did not ask a question which was not proper under the *Olson Rug Company* decision. Mr. Borchardt was investigator for Schweitzer & Company to prepare this case for hearing. He represented Schweitzer & Co. before the Industrial Commission. (Res. A. 421-423.) To say that he could appear before the jury as a completely disinterested witness is contrary to all American law.

In *Eichel* v. *New York C. R. Co.*, 375 U. S. 253, the plaintiff recovered under the Employers Liability Act. The defendant offered to show that plaintiff was receiving benefits under the Railroad Retirement Act. The court held this evidence was not admissible to impeach the plaintiff's testimony. The evidence was not offered to show the interest of other witnesses.

In *Tipton* v. *Socony Mobil Oil Co.*, 375 U. S. 34, the court admitted evidence of compensation benefits received by the plaintiff in diminution of damages. The court held it was not admissible. The case does not contain a dictum contrary to the ruling of the *Olson Rug* decision.

Counsel cites a number of cases. (Res. Brief 12.) We submit it is an imposition upon the Court. There is not a dictum in any one of them bearing on the question decided in the *Olson Rug* decision.

Smith v. *Majestic* (1957), 2 N. Y. 2d 544, the court held it was improper to show that plaintiff was recovering workmen's compensation. The case did not involve the interest of a witness whose employer was to share in the recovery.

None of the cases cited involved the question of showing

the interest of a witness whose employer was to share in the recovery or pay part or all of the judgment. If any one of the above decisions were in point, it is still the duty of the Court of Appeals to follow *Mokrzycki* v. *Olson Rug Co.* (1960), 28 Ill. App. 2d 117, 170 N. E. 2d 635.

A party is entitled to show the interest in the suit of any witness who gives evidence against him.

The decision by the Court of Appeals creates a conflict. If a case is brought in the United States District Court and the plaintiff brings in employees of his employer, who is the principal beneficiary of the lawsuit, the defendant would be precluded from showing the interest of these witnesses. If the suit is brought in an Illinois court, the Illinois court would follow *Mokrzycki* v. *Olson Rug Co.* (1960), 28 Ill. App. 2d 117, 170 N. E. 2d 635.

III.

The Court of Appeals for the Seventh Circuit followed two state court cases.

As was said in *Simler* v. *Conner* (1963), 372 U. S. 221 at 222:

> "Only through a holding that the jury-trial is to be determined according to federal law can the uniformity of its exercise which is demanded by the Seventh Amendment be achieved."

In refusing to follow *Allen* v. *United States,* 164 U. S. 492 at 501, the Court of Appeals has created a conflict among the Circuits. The decision is squarely in conflict with *Orthopedic Equipment Co.* v. *Eutsler,* 276 Fed. 2d 455 (Pet. 34).

It is in conflict with *Thompson* v. *Allen,* 240 Fed. 2d 266.

It is in conflict with a prior decision by the Seventh Circuit. In *Jenkins* v. *United States,* 380 U. S. 445, the

Court had told the jury, "You have got to reach a decision in this case." This court held that this was coercive.

United States v. *Rogers,* 289 Fed. 2d 433, the Court instructed the jury regarding its duty to agree but without ameliorating the admonition that no juror should yield his conscientious conviction. The court held that this was coercive.

In this case the District Judge told the jury:

> "Remember, though, at all times no juror is expected to yield his conscientious conviction that he or she may have as to the weight or the effect of the evidence, but remember also that after a full consideration of all the evidence, it is your duty, if you can, to agree upon a verdict if you can do so without violating your individual judgment and your conscience." (Res. A. 663.)

In *Green* v. *United States* (1962), 5th Cir., 309 Fed. 2d 852, the court at the close of the trial refused to charge the jury that in order to convict any defendant the jury must find without a reasonable doubt that the act alleged to have taken place in the Northern District of Florida was in fact committed, and that the defendant had participated in it. The Court at page 854 quotes from *Allen* v. *United States* and says,

> "This is the uttermost limit of its permissible use."

These cases demonstrate that this Court should allow certiorari and clarify the law with reference to the relation of the Judge to the jury. If *Allen* v. *United States,* 164 U. S. 492 should no longer be applied, this Court should by decision clarify the law for the District Judges. Hence, this Court should grant a writ of certiorari in this case.

CONCLUSION.

This case involves issues of wide application. Rule 36 is constantly applied by the District Courts. Rule 11 should be construed by this Court in its relation to Rule 36. The decision of the Court of Appeals creates a conflict of law in Illinois. It thwarts the purpose of the provision of the Judicature Act that the law of the state should be the rule of action. It creates a conflict in the Circuits as to the relation of the Court to the jury and what instruction would constitute undue coercion. The petition for writ of certiorari should be granted.

Respectfully submitted,

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